Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

DAVID GENE LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state official charged under 18 U.S.C. § 242 with the crime of maliciously violating a citizen's Eighth Amendment rights entitled to raise a claim of good faith immunity or lack of fair warning before trial, as can either a state official sued civilly in federal court or a federal official subjected to a criminal prosecution in state court for the same alleged constitutional violation?

2. Can misconduct at an initial trial by a prosecutor which is not directed at causing, and does not result in, a mistrial, but rather is intended to avoid an acquittal, raise a bar to retrial under the Double Jeopardy Clause following a conviction and reversal on appeal?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	14
I. THE NINTH CIRCUIT'S DECISION DENYING A STATE OFFICIAL FACING A FEDERAL PROSECUTION HIS RIGHT TO A PRETRIAL DETERMINATION AS TO WHETHER HE IS PROTECTED BY A QUALIFIED IMMUNITY PRESENTS AN UNSETTLED FEDERAL PROCEDURAL ISSUE OF OBVIOUSLY GREAT IMPORTANCE TO STATE OFFICIALS AND IS IN APPARENT CONFLICT WITH THIS COURT'S REASONING IN *UNITED STATES V. LANIER*	17
II. THE NINTH CIRCUIT HAS REJECTED A LOGICAL AND LIMITED EXTENSION OF THIS COURT'S DOUBLE JEOPARDY HOLDING IN *OREGON V. KENNEDY* WHICH OTHER CIRCUITS AND STATES ARE INCREASINGLY ENDORSING, AND THIS COURT SHOULD BRING ABOUT UNIFORMITY OF DECISIONS ON THIS IMPORTANT CONSTITUTIONAL ISSUE OF FIRST IMPRESSION	24
CONCLUSION	29

TABLE OF CONTENTS – Continued

Page

APPENDIX A: Opinion of the Ninth Circuit Court of Appeals (May 25, 2004) ..... App. 1

APPENDIX B: Reporter's Transcript Reflecting Denial by the District Court for the Northern District of California of Defendant's Motion to Dismiss (March 19, 2003; April 9, 2003) ..... App. 14

APPENDIX C: Order of the Ninth Circuit Court of Appeals Denying Petition for Rehearing (August 4, 2004) ..... App. 22

TABLE OF AUTHORITIES

Page

CASES

Brady v. Maryland, 373 U.S. 83 (1963) 5, 16

Carlisle v. United States, 517 U.S. 416 (1996) 16

Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) 20, 22

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 20, 23

Hope v. Pelzer, 536 U.S. 730 (2002) 18

Hunter v. Bryant, 502 U.S. 224 (1991) 23

Kastigar v. United States, 406 U.S. 441 (1972) 4

Land v. Dollar, 330 U.S. 731 (1947) 14

Marquez v. Gutierrez, 322 F.3d 689 (9th Cir. 2003) 15, 17, 19, 20, 21

Mitchell v. Forsyth, 472 U.S. 511 (1985) 15, 23

Oregon v. Kennedy, 456 U.S. 667 (1982) 24, 25, 26

People v. Batts, 30 Cal. 4th 660 (2003) 25, 26

Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988) 21

Saucier v. Katz, 533 U.S. 194 (2001) 15, 22

The Conqueror, 166 U.S. 110 (1897) 15

United States v. Lanier, 520 U.S. 259 (1997) 15, 17, 18, 19

United States v. Lewis, 368 F.3d 1102 (9th Cir. 2004) 19, 26

United States v. McAleer, 138 F.3d 852 (10th Cir. 1998) 26

United States v. Wallach, 979 F.2d 912 (2nd Cir. 1992) 24, 25, 26, 27, 29

West Virginia v. Laing, 133 F. 887 (4th Cir. 1904) 21

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const., amend. V 2

U.S. Const., amend. VIII 3

STATUTES

Fed.R.Crim.P. Rule 12(b)(2) 19

Fed.R.Crim.P. 29 16

18 U.S.C. § 242 ..... 2, 4, 18

18 U.S.C. § 924(c) 4

18 U.S.C. § 3231 3

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 15, 18

OPINIONS BELOW

The published opinion of the Ninth Circuit Court of Appeals dismissing defendant Lewis' qualified immunity/fair warning (hereinafter "immunity") claim for lack of jurisdiction and affirming the district court's denial of his motion to dismiss on double jeopardy grounds is reported at *United States v. Lewis*, 368 F.3d 1102 (9th Cir. 2004), and appears at Appendix A. The Ninth Circuit's previous opinion in the case reversing Lewis' conviction is unreported.

The district court's oral decision denying Lewis' motion to dismiss (App. B) is also unreported.

JURISDICTION

On May 25, 2004, the United States Court of Appeals for the Ninth Circuit entered its judgment. App. A. On August 4, 2004, the court entered an order denying Lewis' timely petition for rehearing. App. C. On August 24, 2004, the court entered an order staying issuance of the mandate pending the filing of Lewis' petition for writ of certiorari on or before November 2, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 242 provides:

> § 242. Deprivation of rights under color of law
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

> in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The district court had jurisdiction over this criminal matter under 18 U.S.C. § 3231.

This case arises from an incident in 1994 during which defendant Lewis, then a correctional officer ("CO") employed by the California Department of Corrections ("CDC") at Pelican Bay State Prison ("PBSP") shot and seriously wounded an inmate, Harry Long, who was engaged at the time in a fight with another inmate in a prison yard, after Long refused to cease fighting despite numerous shouted commands to "get down" and the firing of a warning shot. Shortly thereafter, after conducting a hearing at which numerous witnesses, including Lewis, testified, a Shooting Review Board convened by the CDC issued a report finding that the shooting of Long was justified under departmental regulations and guidelines.

A. Procedural History

On June 8, 1999, just prior to the expiration of the applicable limitations period, a grand jury sitting in the Northern District of California, San Francisco Division, returned a two-count Indictment charging Lewis with violations of 18 U.S.C. § 242 (Deprivation of Rights Under Color of Law) and 18 U.S.C. § 924(c) (Use of a Firearm in Relation to a Crime of Violence). The government filed a Motion in Limine to Exclude Any Mention of the Shooting Review Board's Decision as to David Gene Lewis which was granted.

Jury trial commenced on January 24, 2000. On February 14, 2000, the jury returned verdicts of guilty on both counts. On May 19, 2000, the district court sentenced Lewis to an aggregate term of incarceration of 93 months. On the same date, Lewis was remanded into custody and filed his notice of appeal.

Shortly after oral argument on his appeal before the Ninth Circuit Court of Appeals in August 2001, the Court ordered Lewis released on bail on the ground that he was likely to prevail on the appeal. On October 26, 2001, the Court of Appeals reversed Lewis' convictions and remanded the case for a new trial, ruling that the aforementioned Shooting Review Board Report ("SRBR") exonerating Lewis had been improperly excluded from evidence. Rehearing was denied and the case was remanded to the district court on January 16, 2002.

Following the remand, the parties filed multiple pretrial motions in the district court which clarified the nature of the evidence to be presented at trial. These included a motion to dismiss under *Kastigar v. United*

States, 406 U.S. 441 (1972), filed by Lewis on the ground that he had been compelled to give testimony in the internal investigation that followed the Long shooting. Although it denied the motion, the court required the government to file a complete list of witnesses it intended to call at trial, as well as a description of the source and content of their proposed testimony.

On February 5, 2003, Lewis moved to dismiss the prosecution against him on two grounds: (a) given the theory and evidence on which it had been established the government would try him, he was immune from prosecution under controlling decisions of this Court and the Ninth Circuit; and (b) based on newly unearthed Brady violations occurring during Lewis' first trial,[1] the government was barred under the Fifth Amendment's Double Jeopardy Clause from retrying him. After full briefing and oral argument, the immunity claim was denied by the district court on March 19, 2003 and the double jeopardy claim was denied on April 9, 2003. App. B.

On April 10, 2003, Lewis filed an interlocutory appeal of the denial of his motion to dismiss on both the immunity and double jeopardy grounds. The government then moved the district court on April 14, 2003 to dismiss the appeal as frivolous. The court denied the motion on April 23, 2003.

Following oral argument on January 13, 2004, the Ninth Circuit entered its judgment on Lewis' interlocutory appeal on May 25, 2004, dismissing Lewis' immunity claim for lack of jurisdiction and affirming the district court's

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

order denying his motion to dismiss on double jeopardy grounds. App. A. On August 4, 2004, the Ninth Circuit denied Lewis' petition for rehearing (App. C), and, on August 24, 2004, that court issued an order staying its mandate until November 2, 2004 to permit Lewis to file the instant petition and, upon such filing, until this Court's final disposition of the petition.

B. Underlying Facts

1. The Trial Testimony Concerning the Shooting

This is a case that already has been tried. Required to preview its evidence at retrial in response to Lewis' *Kastigar* motion, the government revealed that it had no new percipient witnesses to the Harry Long shooting. The evidence concerning the shooting itself that would be offered at a retrial is thus a known commodity.

PBSP housed Level IV prisoners, the highest security classification in the CDC. RT 2/8/00 at 1498. Inmates were sent there not because of their commitment offenses, but because they had demonstrated an inability to live by the rules of other CDC prisons. RT 1/25/00 at 248. They were described as "the worst of the worst." *Id.* at 249. The charged shooting occurred on PBSP's "A" yard, where inmates took their exercise. RT 1/25/00 at 238. An armed CO watches the entire yard from a central gun tower. *Id.* at 241; RT 1/31/00 at 687. In addition, armed COs watch the yard from the control booths located in each of the eight housing units adjacent to the yard. RT 1/31/00 at 687. Finally, five or six unarmed COs patrol the yard on the ground. *Id.* at 686. Lewis was in the control booth of Housing Unit 5 when the shooting took place. RT 1/31/00 at 745.

Lt. Burlison of the CDC described the victim Harry Long as "a bit strange. He was in a world of his own." RT 1/25/00 at 232. An inmate described him as "confused" and "heavily medicated." RT 1/31/00 at 723. Long's commitment offense was oral copulation with force on an adult (Govt. Ex. 8), but other inmates believed him to have been convicted of a sexual offense involving a minor. RT 1/25/00 at 265; RT 1/31/00 at 725. He has a sixth grade education (RT 1/25/00 at 264) and therefore could not read or understand the orientation materials given to new inmates at PBSP (*id.* at 286). Among other things, these orientation materials explained to the new inmates that, in the event they became involved in a fight, if a command to get down is given and they do not get down immediately, they would be treated "as part of the ongoing incident." RT 1/15/00 at 253. Long admitted that he may have told a psychiatrist that he would fight to the death if attacked by another inmate. *Id.* at 299.

On June 20, 1994, at approximately 9:45 a.m. (RT 2/3/00 at 1307), inmate Tommy Willis assaulted Long in the "A" yard, striking him first in the back of the head. RT 1/25/00 at 268, 302. Willis testified that he had decided to attack Long just because he didn't like him; he didn't care whether Long was a rapist or not. RT 1/27/00 at 520. Willis informed fellow inmate Billy Boyd beforehand of the planned attack in case he needed help. "Billy better kick him in the head or do something to him. We're partners. I'd do the same for him." *Id.* at 522.

Accounts of the fight and the shooting varied greatly. Willis had meant to hit Long in the jaw and knock him out, but he must have missed. RT 1/27/00 at 525. Willis believed five or six blows were exchanged before a warning shot was fired. *Id.* at 527. One inmate estimated that the

fight continued for 15 to 20 seconds before the yard was called down (RT 2/1/00 at 857), that is, orders were given for the inmates to get down on the ground in a prone position, and then within seconds, almost immediately, the warning shot was fired (*id.* at 858). Another inmate witness believed the warning shot came "in a matter of seconds" after the fight began. RT 1/31/00 at 593.

The yard gunner, Rick Sample, fired the warning shot (RT 2/3/00 at 1309) from a distance of about 50 yards from the fight (RT 2/7/00 at 1341). Sample had already shouted through his loudspeaker numerous times for the fighters to get down before firing that shot. *Id.* at 1309, 1336. Other CDC staff present in the yard also shouted the "Get down" order numerous times. *Id.* at 1366; RT 2/8/00 at 1535. One officer testified that he personally ordered the inmates down eight times. RT 2/7/00 at 1366. In response to the shouted commands, all of the other inmates in the yard went down except for the fighters. RT 2/7/00 at 1309; RT 2/8/00 at 1534. One CO grabbed her baton and started to respond to the fight until somebody yelled at her to stop, which she did. RT 1/27/00 at 368. The warning shot caused a momentary pause in the fight. RT 2/7/00 at 1309.

As Willis recalled it, after the warning shot, he got down on one knee, but Long did not go down. RT 1/27/00 at 528. Instead, Long ran at him. *Id.* This was confirmed by CO Sample, who saw Long get up and "aggress" Willis following the shot. RT 2/7/00 at 1309. CO Parker saw the same thing. *Id.* at 1368. So did Sgt. Rice. *Id.* at 1629. Willis testified that when Long came running at him after the warning shot, it was to kick him while he was down. RT 1/27/00 at 534. He knew this because Long had already reared back his foot. *Id.* at 535.

Willis got up, caught Long around the waist, and they fell together into the chain-link fence separating the lower and upper yards. RT 1/27/00 at 528. This comported with CO Sample's recollection. RT 2/7/00 at 1309. Another inmate described this battle after the brief separation caused by the warning shot as "pretty intense," lasting for five to ten seconds. RT 2/1/00 at 860. Willis got Long pinned down and was hitting him when he heard Boyd yell at him to get off or they would shoot him. RT 5/27/00 at 529. Believing that, Willis jumped off Long and went down. *Id.* Long got up and "Boom, he got shot." *Id.*

CO Sample testified that, after Willis had disengaged, at the time the shot that hit Long was fired, Long "was getting ready to engage again." RT 2/7/00 at 1309. Willis also testified that Long was again coming at him when he got shot; Willis was thinking he was going to have get back up because he was not going to let Long kick him in the face. RT 1/27/00 at 529. CO Parker recalled that Long reattacked Willis following their getting down and the firing of the warning shot, and it was then that Long got shot. RT 2/3/00 at 1366-67.

It was Lewis who shot Long; the bullet traveled about 340 feet. RT 1/31/00 at 770; RT 2/1/00 at 811. CO Patton testified that he was standing 50 yards or less from the fight, and that, although he knew both the inmates involved, he could not identify them from that distance. RT 1/27/00 at 513. At the time, Lewis was working an overtime shift as a gunner in one of the housing units that faced "A" yard. RT 1/31/00 at 713. He had received the call to work that shift the night before. *Id.* at 714. Lewis' regular assignment was in a completely separate part of PBSP. RT 2/9/00 at 1803.

As the associate warden of PBSP testified, a fight that continues after a warning shot is fired becomes "much more than just a fistfight," as borne out by past experience with such incidents where "it was discovered that the aggressor was stabbing the victim." RT 2/8/00 at 1517-18. There was a plethora of testimony from witnesses recounting their percipient experience with great bodily injury being inflicted either without weapons (RT 1/27/00 at 341; RT 2/7/00 at 1341; RT 2/8/00 at 1523) or with the use of homemade weapons in the course of what otherwise appeared to be a mere fistfight (RT 1/27/00 at 406; *id.* at 488; RT 1/31/00 at 710; RT 2/7/00 at 1324; RT 2/8/00 at 1644). Indeed, on the day before the fight, Long himself had a razor-blade weapon taken away from him by another inmate. RT 1/31/00 at 727.

2. The Shooting Review Board Report

Shortly after the shooting, a Shooting Review Board was convened by the CDC. Three of the four Board members were not from PBSP; the chairperson was the warden from the Sierra Conservation Center. The members reviewed the relevant administrative procedures, supplements, written reports, post orders, and training requirements. Interviews were conducted with all staff who were relevant witnesses. Lewis himself was interviewed.

The SRBR reviewed all of the witness statements and documentary evidence, recited its findings, and came to a conclusion: Willis and Long were fighting. Various staff shouted numerous warnings to the inmates to stop fighting and get down, which went unheeded. At that time, CO Sample fired a warning shot. Long and Willis then disengaged and assumed "semi-prone positions." Seconds later,

however, Long continued to assault Willis. More warnings were yelled at the inmates. At that point, Lewis, believing that great bodily injury was likely, fired at Long. Lewis justifiably shot inmate Harry Long.

3. The District Court's Findings Concerning the Government's Theory of Malice

At Lewis' first trial in 2000, the government introduced evidence that, in the immediate aftermath of and in the days following the shooting, Lewis allegedly made a series of comments regarding the shooting. "I've cut myself worser shaving" (RT 1/27/00 at 565); "The only thing I'm upset about is I didn't hit him in the 5X" (RT 1/31/00 at 692);[2] "F - - - that guy. He's nothing but a Chester" (*id.* at 736);[3] "He had it coming. . . . It's too bad the son of a bitch didn't die" (*id.* at 754); "[I] put a hole in the guy's Triple X" (RT 2/1/00 at 838); "That Chester deserved to die" (*id.* at 865); "That Chester got what he deserved" (RT 2/3/00 at 1243).

The government also introduced evidence regarding Lewis' hatred for child molesters. *See, e.g.*, RT 1/31/00 at 623 (Inmate Turner's testifying Lewis said to him, "We should have them all shot, lined up on the fence and have them all shot."); *id.* at 753 (CO Murray testifying, "[Lewis] called them Chesters and [said] they shouldn't be allowed to live"); RT 2/2/00 at 1150 (Inmate Navey's testifying that

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[2] "5X" is written in the center of the target used for firearms training at PBSP. RT 1/31/00 at 693, 706-07.

[3] Those inmates committed for sex offenses involving a minor were often referred to at PBSP as child molesters or "Chesters." RT 2/9/00 at 1724.

Lewis said child molesters "should all die, they have no place on this earth"). Sgt. McKinney testified that he had asked of Lewis in the aftermath of an inmate assault upon another inmate what had happened, and Lewis responded, "It's just a baby raper and don't even worry about it. It's not a big deal." RT 2/3/00 at 1210.

At Lewis' trial, the government initially suggested that it could prove that the shooting of Long had been "set-up" by Lewis and certain inmates because of their mutual animosity towards child molesters, but the theory collapsed when Willis testified without contradiction that he attacked Long simply because he did not like him, and that there had been no plan with others to do so. RT 523.

Following the reversal and remand, the government stated during pretrial proceedings that it had abandoned its conspiracy theory and would offer no testimony at Lewis' retrial concerning a "set-up." Rather, as at the first trial, the prosecution would rely on the theory that Lewis hated child molesters, mistakenly believed Long to be one, and on the spur of the moment took advantage of the Willis-Long altercation to shoot without justification and with malice a member of a class of prisoners he hated.

On December 11, 2002, the district court held a hearing on Lewis' motion to take the jury to PBSP in order to view the scene where the charged shooting occurred and to see for themselves whether someone from Lewis' vantage point would have been able to discern the identity of an inmate at the location in the yard where Long was shot. Lewis' motion noted that the very first request made by jurors at his trial, denied by the court, had been to conduct an experiment by which jurors could view a person through the peep sight of the rifle used by Lewis at

the same distance as Long had been from Lewis. RT 2/10/00 at 1996.

In response to this motion for a jury view, the court asked counsel for the government whether it intended to offer "testimony from some witness on behalf of the government that a person standing in the location where the defendant, Mr. Lewis, was standing at the time of the shooting would be able to differentiate Long from other inmates and draw the conclusion that this was Mr. Long?" RT 12/11/02 at 4. The government replied that there "certainly won't be testimony that's that specific." *Id.* The government agreed that there had been no telescopic sight on Lewis' rifle, and that he had fired using the naked eye. *Id.* at 5. The defense stated that, if no jury view were granted, it would "call a dozen guards who say that they have sighted down that rifle from that distance and could not distinguish" an inmate's identity. *Id.* at 9. The district judge, who had also presided over Lewis' first trial, then characterized the task facing the government:

> You know, it's a tough case. It's been a tough case from the beginning because at some point the government realized that they didn't have a conspiracy, so they couldn't say this is a setup.
>
> And they got this guy . . . Willis [. . .] who says: "You know, I just saw this guy. I hate child molesters. And I saw one out there. And frankly, I didn't want him in my sight. And I thought I would beat him up for the fun of it, and I did."
>
> Okay. And then you have to be able to prove that the defendant, recognizing this wonderful opportunity to blow away a child molester in the heat of all this – and he's not the only one who fired,

> as I understand it. You got somebody else who might be here, but he missed. Okay.
>
> So you got the defendant. You have to prove he knew he didn't have probable cause to shoot, even though there was a real fight going on and even if he jumped the gun, literally or figuratively, he wasn't trying to do something he knew was wrong.
>
> It makes it awfully hard, particularly if, on top of everything else, *he says he couldn't see him and nobody can say to the contrary*, unless he had other reason to know he was going to be out on the yard.
>
> So if there are other witnesses who are going to say he knew or was tipped off – this wasn't even . . . [his] shift, as I recall. It was a fill-in. The whole thing gets real tough.

Id. at 9-10 (emphasis added).

REASONS FOR GRANTING THE PETITION

The district court's denial of Lewis' motion to dismiss not only raises significant issues of first impression, but his claims are "fundamental to the further conduct of this case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (granting certiorari where court of appeals reversed district court's denial of civil defendants' motion to dismiss) (citation omitted). If Lewis is correct about his immunity claim – that he is entitled to litigate the claim prior to trial – then his prosecution will necessarily be dismissed at that juncture because its facts sit on all fours with those of controlling Ninth Circuit precedent in *Marquez v.*

Gutierrez, 322 F.3d 689 (9th Cir. 2003) ("*Marquez*"). In that case, the court found a CDC officer immune from civil liability for his shooting at a distance of over 100 yards an inmate during a fight in a prison yard on the ground that a reasonable officer could have believed the shooting was lawful. *Id.* at 693, citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986) ("a prison guard is permitted to use deadly force in a good faith effort to maintain or restore discipline"). Thus, this is precisely that instance in which "the facts of the case require an earlier interposition" by this Court. *The Conqueror*, 166 U.S. 110, 114 (1897). Lewis should not have to stand for retrial at all, and this Court's intervention is the lone mechanism by which the core function of the immunity doctrine can be realized in this case and others like it.

As this Court has made clear, the rationale of the doctrine in civil cases rests on the proposition that the "privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001), quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in *Mitchell*). As just noted, under Ninth Circuit precedent, as a matter of law, Lewis will be found to be protected by qualified immunity upon the issue's litigation. That being so, as a public official, he needs and deserves as much procedural protection from a baseless criminal prosecution under section 242 as he does from a meritless civil suit under 42 U.S.C. § 1983. The good faith immunity doctrine cannot provide the "same protection" in a criminal as in a civil case, as this Court says it must (*United States v. Lanier*, 520 U.S. 259, 270-71 (1997)), unless an immunity claim can be raised and litigated in a pretrial context and,

if denied, be appealed before trial. Yet, because this Court has not yet been heard on the issue, the Ninth Circuit has denuded this protection in the criminal context, to the great prejudice of a state official merely performing his (most difficult) duties. This Court should correct the court of appeals' holding that the district court lacked the power in a criminal case to adjudicate pretrial a state official's immunity claim. *Cf. Carlisle v. United States*, 517 U.S. 416 (1996) (granting certiorari to determine power of district court to rule on untimely motion for judgment of acquittal).

As to Lewis' second claim – that he was entitled to at least an evidentiary hearing on whether, because of *Brady* violations at his first trial which were not directed at causing a mistrial, but rather, at avoiding an acquittal, the Double Jeopardy Clause precluded his retrial following the reversal of his conviction on appeal – the Ninth Circuit's decision denying such entitlement is the latest in a growing conflict between circuits, with state courts also divided on this constitutional issue of first impression, which should now be resolved by this Court. There is substantial evidence in the record that the government avoided dismissal under Fed.R.Crim.P. 29 at Lewis' first trial by suppressing exculpatory evidence that he could not have identified Long and that there was a knife involved in the fight, either of which was fatal, or very nearly so, to the government's case. If such misconduct can create a double jeopardy bar because intended to avoid an acquittal that the prosecutor understood was likely in the absence of the misconduct, as the Second Circuit and California Supreme Court, among other courts, have held, at a minimum an evidentiary hearing is required in this case. For the same reasons stated above, then, this Court's intervention at

this juncture is entirely appropriate to resolve this issue. Again, it is fundamental to the further conduct of the case. Again, absent such intervention, Lewis will be improperly compelled to undergo a second trial.

I. THE NINTH CIRCUIT'S DECISION DENYING A STATE OFFICIAL FACING A FEDERAL PROSECUTION HIS RIGHT TO A PRETRIAL DETERMINATION AS TO WHETHER HE IS PROTECTED BY A QUALIFIED IMMUNITY PRESENTS AN UNSETTLED FEDERAL PROCEDURAL ISSUE OF OBVIOUSLY GREAT IMPORTANCE TO STATE OFFICIALS AND IS IN APPARENT CONFLICT WITH THIS COURT'S REASONING IN *UNITED STATES V. LANIER*

Were Lewis confronted with a civil lawsuit predicated on the identical facts underlying his federal criminal prosecution, he would not be subjected to a trial. He would raise his immunity defense by way of a pretrial motion to dismiss or for summary judgment and the district court would be bound to address and grant it under controlling Ninth Circuit precedent. *See Marquez v. Gutierrez*, 322 F.3d 689 (9th Cir. 2003). The Ninth Circuit, however, refused to extend this pretrial-adjudication right to the criminal context even though this Court has held that the qualified immunity that a state official enjoys from a civil suit claiming a violation by that official of a citizen's constitutional rights is equaled in the criminal context. *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). Indeed, as the Court noted, the very source of a public official's immunity from civil liability is that provided him or her against criminal prosecution under the "fair warning" doctrine. *Id.* ("[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately,

governments) *the same protection* from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.") (emphasis added). *See also Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.").

Under *Lanier*, the right of a state official such as Lewis to immunity from prosecution under section 242, which criminalizes the malicious violation of a citizen's constitutional rights under color of official right, turns on the same question as does that official's right to immunity from civil suit under parallel federal statutes: "criminal liability under § 242 . . . may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness under the Constitution [is] apparent . . . .'" *Lanier*, 520 U.S. at 271-72, citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The district court denied Lewis' immunity claim in this case because it did not believe that there existed in the criminal context a procedural vehicle parallel to those of a civil case by which to raise a claim of immunity prior to trial. That court also ruled that the decision of the immunity question necessarily involved resolution of the issue of malice, an element of the charged offense, and thus was a question reserved for the jury. The Ninth Circuit, while recognizing that the holding of *Lanier* "may ultimately protect Lewis from criminal liability," agreed that the immunity claim could not be raised either prior to trial in the district court or by means of interlocutory appeal, labeling the good faith immunity claim a "fair warning defense [that] goes to the heart of his criminal

liability" (*Lewis*, 368 F.3d at 1106), thereby strongly suggesting that the *Lanier* issue was one to be decided by the jury. The Court of Appeals, however, in reaching that result, construed *Lanier* too restrictively, ignored its own precedent, and failed to recognize the "express authority" which it claimed was lacking (*id.* at 1105) that permits such pretrial adjudication in a criminal case.

Rule 12 of Federal Rules of Criminal Procedure is ample authority. *See* Fed.R.Crim.P. Rule 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.") The Advisory Committee Notes to Subdivision (b)(1) and (b)(2) of Rule 12 accompanying the 1944 enactment of the Rule *expressly* cite immunity as a matter which may be raised by motion before trial. *Cf.* Advisory Committee Notes to 1975 Amendment to Rule 12 ("The Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make the ruling unnecessary.").

Contrary to the Ninth Circuit's assertion herein, an immunity claim does not "go to the heart of criminal liability" and thereby become a jury issue because, as that court had previously acknowledged in *Marquez*, the existence of such immunity does not turn on the presence or absence of the key element of a section 242 violation: *viz.*, malice. As the Court of Appeals had earlier expressly and correctly concluded:

> [A] claim of qualified immunity is not defeated simply because a triable issue of fact exists as to whether the decision to shoot [an inmate] was malicious.

Marquez, 322 F.3d at 693 (citation omitted). Irrespective of whether a defendant officer acted with malice and thus violated the Eighth Amendment, that officer is *nonetheless* entitled to immunity if a reason-able officer could have believed that the shooting was lawful. Again, the applicable standard in the determina-tion of the immunity issue is that of *objective* reasonable-ness "as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, the very reason this Court modified the standard for qualified immunity to eliminate its subjective component was precisely to facilitate its pretrial adjudication. *Id.* at 815-16.

The immunity issue most similar to that of a state official's claiming protection against a section 242 prosecution on the ground he acted in good faith in shooting an inmate would be a federal official's claiming immunity under the Supremacy Clause when charged in state court for the use of excessive force. There is no question but that these analogous issues of immunity under the Supremacy Clause may be litigated in the district court prior to trial and are subject to interlocutory appeal. *See, e.g., Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977) (relying in part on civil immunity cases and holding federal agent who shot unarmed suspect in back as he fled and killed him was immune under Supremacy Clause from state murder prosecution because agent's belief that suspect was potentially armed and dangerous and that his escape into the woods would pose a danger to the lives of the pursuing officers was reasonable). Cases such as *Clifton* make it especially troubling to deny a defendant in Lewis' position a right to the pretrial litigation of his immunity claim – not only would he have such right in a civil case, but he

would also have such right were he a federal official facing a criminal prosecution in state court.

In addition, Lewis' immunity claim cannot be a "defense" to be passed on by a jury because it requires a threshold assessment of the law defining the constitutional right the defendant allegedly violated, a task beyond a jury's competence.[4] As with immunity issues arising under the Supremacy Clause, fair warning or good faith immunity questions are for the court, not the jury. *West Virginia v. Laing*, 133 F. 887, 891 (4th Cir. 1904) noting that, with regard to Supremacy Clause immunity, "Congress certainly intended, in cases of this character, that the judges of the United States should hear the evidence, and without a jury proceed in a summary way to pass upon the federal [immunity] question involved"); *cf. Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. 1988) (*en banc*) ("issue of qualified immunity is a legal question for the trial court, not the jury").

Adjudication under Rule 12 is especially appropriate in this case because the facts upon which Lewis rests his claim of good faith immunity were not in dispute between the parties: (1) Harry Long was involved in an altercation with Tommy Willis in the "A" yard at PBSP; (2) correctional officers shouted commands to "get down" which the combatants ignored; (3) a warning shot by a guard other

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[4] The qualified immunity inquiry has two parts: "(1) Was the law governing the state official's conduct clearly established? (2) Under that law could a reasonable state official have believed his conduct was lawful?" *Jeffers*, 267 F.3d at 910 (quoting *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir. 1995) (internal quotation marks omitted)).

Marquez, 322 F.3d at 692.

than Lewis was then fired, which caused Willis to get down; (4) Long got up after the warning shot; (5) Lewis fired at Long from a distance of over 110 yards; (6) Lewis was not involved in a "set-up" or conspiracy to have Long shot; and (7) a Shooting Review Board found the shooting justified and within CDC policy on the use of deadly force. Furthermore, the government could offer no evidence that Lewis could have discerned Long's identity from the distance at which he shot him. Rejecting the authority of Rule 12 appears particularly misplaced where, as here, the undisputed facts compel the granting of the motion under already established precedent. As noted, the lone disputed issue – whether Lewis acted with malice – is irrelevant to the immunity question.

As this Court has made clear, the entire rationale of the qualified good faith immunity doctrine in civil cases rests on the proposition that the "privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (citation omitted). This rationale applies with even greater force in the criminal context – having to live through the great anxiety of a criminal trial (and, in Lewis' case, a second criminal trial) destroys the core benefits that the immunity doctrine is meant to bestow. This has been understood in the Supremacy Clause immunity cases. *See, e.g., Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977) (affirming grant of habeas petition barring state criminal trial of federal law enforcement agent).

Moreover, it is not solely Lewis' interests that would be served by the pretrial adjudication of his immunity claim because other interests, delineated by this Court in

the civil context, again apply with equal or greater force to the criminal. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982):

> [C]laims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

Id. at 814 (footnote, brackets, and internal quotation marks omitted). It is precisely to protect these interests that this Court permits the immediate, interlocutory appeal of a district court's denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) ("we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation"). Permitting the district court to adjudicate an immunity claim prior to a federal criminal trial of a state official provides an additional safeguard for these interests, serving as it would to deter frivolous or vindictive charges serving political ends rather than the ends of justice.

II. THE NINTH CIRCUIT HAS REJECTED A LOGICAL AND LIMITED EXTENSION OF THIS COURT'S DOUBLE JEOPARDY HOLDING IN *OREGON V. KENNEDY* WHICH OTHER CIRCUITS AND STATES ARE INCREASINGLY ENDORSING, AND THIS COURT SHOULD BRING ABOUT UNIFORMITY OF DECISIONS ON THIS IMPORTANT CONSTITUTIONAL ISSUE OF FIRST IMPRESSION

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), this Court held that the Double Jeopardy Clause bars retrial even in a case where the initial trial was mistried at the request of a defendant, if the prosecutor had deliberately engaged in misconduct in order to avoid an acquittal by precipitating that mistrial. In *United States v. Wallach*, 979 F.2d 912 (2nd Cir. 1992) (*"Wallach II"*), the Second Circuit considered the double jeopardy consequences not of a mistrial, but of a reversal of a conviction on appeal because of prosecutorial misconduct at trial. The Second Circuit agreed that there was "force to Wallach's argument for some sort of extension" of *Kennedy* to the context where an initial trial ends not in a mistrial, but a reversal on appeal. *Id.* at 915.

The *Wallach II* court concluded that a double jeopardy bar should logically exist "where the misconduct of the prosecutor is undertaken not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Id.* at 916. The court reasoned:

> The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in

> an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.

Id. at 916. The court then proceeded to apply its test to the facts before it.

The California Supreme Court has since incorporated the *Wallach II* test into its interpretation of the double jeopardy clause of the California Constitution. *People v. Batts*, 30 Cal.4th 660, 694, 68 P.3d 357, 134 Cal.Rptr.2d 67 (2003). In so doing, the court found *Wallach II*

> to be helpful because it illuminates a double jeopardy interest beyond the narrow one recognized in *Kennedy, supra*, 456 U.S. 557. *Wallach II* recognizes that a defendant's double jeopardy rights are implicated not only when a prosecutor intends to and does provoke a mistrial, but also when a prosecutor intentionally commits misconduct in order to deprive the defendant of an acquittal that the prosecutor believed, in light of the events at trial (including reactions and demeanor of the jury), was likely to occur in the absence of the misconduct. Because we believe the decision in *Wallach II* accurately identifies the scope of interests that the California double jeopardy clause is intended to protect, we find

> that opinion useful in crafting an appropriate state double jeopardy standard. (*See Emerging Jurisprudence, supra*, 71 Temple L.Rev. 887, 909 [*Wallach II* test "open[s] the way to a double jeopardy/misconduct jurisprudence that is far more satisfactory than the narrow holding of *Kennedy*," because it is "tied directly to the principles and rationale underlying the double jeopardy protection in the first place"].)

Id. at 695.

Significantly for this Court's decision whether to grant certiorari, as the *Batts* court noted, "The test in *Wallach II* has been reaffirmed by the Second Circuit, and endorsed by the First Circuit Court of Appeals and various state jurisdictions" and "[s]till other jurisdictions that initially expressed skepticism have since spoken positively of the *Wallach II* approach." *Id.* at 694 n.26 (citing cases). On the other side of the ledger, *Batts* also noted that several states have rejected *Wallach II* (*Batts*, 30 Cal.4th at 694 n.26, citing decisions from Iowa, Texas, and Ohio) and the Ninth Circuit, in the instant case, asserted that "[o]ther circuits . . . have declined to broaden the scope of the Double Jeopardy Clause in this fashion," citing as an example, *United States v. McAleer*, 138 F.3d 852, 856 (10th Cir. 1998). *Lewis*, 368 F.3d at 1108.

This case raised for the first time in the Ninth Circuit the issue confronted by the Second Circuit in *Wallach II*, and it reached a contrary conclusion. The Ninth Circuit demanded that Lewis make a "showing that the prosecutors deliberately engaged in misconduct in order to secure a second trial" (*Lewis*, 368 F.3d at 1109) rather than demanding a showing that prosecutors deliberately engaged in misconduct in order to avoid an acquittal they

knew was inevitable absent their misconduct. Had the court applied the *Wallach II* test, a remand for an evidentiary hearing would have been necessary. The government suppressed exculpatory material bearing on two critical factual issues, either of which, if decided in Lewis' favor, would have required his acquittal, and this had to have been eminently clear to the prosecutors.

The government's theory of malice – that Lewis took advantage of the Willis-Long altercation to shoot Long whom Lewis mistakenly believed was a convicted child molester, a class of inmates Lewis despised – depended entirely on Lewis' ability to identify Long at the distance of over 110 yards from which he shot him. Secondly, because Lewis was indisputably permitted under CDC policy to use lethal force to break up a fight involving a deadly weapon following a disregarded warning shot, it was essential to the government's chances for conviction that neither Willis nor Long possessed a knife during their combat.

At a hearing held a few weeks before retrial was to commence, prosecutors informed the district court that they had discovered a considerable number of reports of witness interviews which should have been, but were not, turned over to the defense prior to Lewis' first trial. RT 1/17/03 at 4-7. One such report was of a 1999 interview by the FBI of CO Lucas who was in the control booth with Lewis at the time of the shooting of Long. Lucas confirmed that there were no binoculars present and that "one could see motions made by inmates but as far as she was concerned, it would be very difficult to see what was really happening." Dkt. 262, 263. Had this evidence been adduced at the first trial, the jury, already questioning the government's theory that Lewis could identify Long – as evinced by its asking the court for leave to look through

the peep sight of Lewis' rifle held the same distance from an individual as Lewis had been from Long – would have rejected it.

The second failure by the government was even more troubling. Following Lewis' conviction, Long sued the CDC, seeking recompense for his shooting.[5] At his deposition, Lewis' civil counsel read to him that portion of his trial testimony where he denied that Willis had a weapon. Dkt. 172, Ex. A at 4. Long responded: "For the record, I did – I don't know why I said that, but for the record all the statements I made to everybody, I always stated there was a razor blade in all the investigative reports." *Id.* at 4-5. Long then claimed that, while the prosecutor and FBI case agent were preparing his testimony, they directed him not to mention the razor blade, and to say instead that he could not recall whether a weapon was involved. *Id.* at 5-8, 10.

Long's civil testimony was corroborated in significant respects by the FBI case agent, Special Agent Walker. As defense counsel summarized the agent's statements:

> FBI agent Walker has said that during the preparation of Harry Long, Harry Long made references to the fact that he believed of had a vision of Willis having a knife . . . Walker was uncomfortable with the fact that prosecutor Austin had told this witness that: "If the subject of a knife comes up, say you don't know or you don't remember," which is pretty close to exactly what Harry Long said under oath had occurred in the pretrial conversation.

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[5] The case has since been dismissed.

RT 3/19/03 at 22. Long testified at Lewis' trial not only that there was no knife, but that he had never told the prosecutor anything different.

Thus, this was precisely a case in which application of the *Wallach II* test would have made a difference. In stark contrast to the *Wallach II* facts, from which the court found it "entirely unrealistic" to infer an apprehension of acquittal on the part of the prosecutors (*Wallach II*, 979 F.2d at 916), in Lewis' case, such an inference is not only realistic, it is highly probable.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and order briefing and argument on the case in this Court.

Dated: November 2, 2004

Respectfully submitted,

DENNIS P. RIORDAN

Counsel of Record for
Petitioner David Gene Lewis

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DAVID GENE LEWIS, *Defendant-Appellant.*	No. 03-10181 D.C. No. CR-99-00186-1-MMC OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
January 13, 2004 – San Francisco, California

Filed May 25, 2004

Before: J. Clifford Wallace, M. Margaret McKeown, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

COUNSEL

Dennis P. Riordan, Riordan & Horgan, San Francisco, California, for the appellant.

Erika R. Frick, Assistant United States Attorney, San Francisco, California, for the appellee.

OPINION

CALLAHAN, Circuit Judge.

David Gene Lewis, a former California correctional officer, appeals the district court's denial of his motion to dismiss the indictment. Lewis raises two issues. First, can Lewis seek interlocutory review of the district court's denial of his "fair warning" defense? Second, did the prosecution's alleged *Brady*[1] violations raise double jeopardy concerns? We answer both questions in the negative.

Background

This matter springs from an incident on June 20, 1994, when Lewis, then a correctional officer at Pelican Bay State Prison, shot and seriously wounded an inmate, Harry Long, during a prison-yard disturbance. Five years after the shooting, a federal grand jury charged Lewis with violating 18 U.S.C. § 242, Deprivation of Rights Under Color of Law, and 18 U.S.C. § 924(c), Use of a Firearm in Relation to a Crime of Violence. One year after the indictment, the Government tried Lewis, and a jury convicted him of both counts.

In January 2002, in an unpublished disposition, we reversed Lewis's convictions and remanded for a new trial. In reversing, we held that the district court had committed error by excluding from trial a Shooting Review Board Report. At a status hearing after remand, the Government revealed that it had just learned about potentially exculpatory material that it had not previously shown to Lewis. The two allegedly withheld pieces of information were (1) statements by Long that his fellow combatant in the

[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution's suppression of evidence material to guilt or punishment violates due process, regardless of the prosecution's good or bad faith).

prison yard had a weapon and (2) a statement by a fellow prison guard that "it would be very difficult to see what was really happening" from the tower where Lewis shot Long.

Lewis moved to dismiss the prosecution against him on fair warning and double jeopardy grounds. The district court denied the motion, and Lewis appealed. The district court subsequently vacated the trial date pending appeal.

Discussion

A. Lewis's Fair Warning Claim

The fair warning requirement ensures that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617 (1954). Lewis contends that this requirement shields him from criminal prosecution for the shooting at Pelican Bay State Prison. While the fair warning requirement may, or may not, shield Lewis from ultimate criminal liability – an issue on which we take no position – this issue is not subject to interlocutory review.

Under 28 U.S.C. § 1291, criminal cases generally are not subject to appellate review "until after conviction and sentence." *See Flanagan v. United States,* 465 U.S. 259, 263 (1984); *United States v. Pace,* 201 F.3d 1116, 1118 (9th Cir. 2000). Courts, however, have carved out a small class of cases from this jurisdictional bar under the "collateral order doctrine." *Pace,* 201 F.3d at 1119. To fall within this exception, the appealed order must "1) 'conclusively determine the disputed question,' 2) 'resolve an important issue completely separate from the merits of the action,' and 3) 'be effectively unreviewable on appeal from a final

judgment.'" *United States v. Bird,* 342 F.3d 1045, 1046 (9th Cir. 2003) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978)).

Nevertheless, the Supreme Court has warned against broadening the scope of interlocutory review in criminal cases. Piecemeal appeals encourage delay, which "is fatal to the vindication of the criminal law." *United States v. MacDonald,* 435 U.S. 850, 853-54 (1978) (citing *Cobbledick v. United States,* 309 U.S. 323, 325 (1940)). Society has an "interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Id.* at 862 (quoting *Barker v. Wingo,* 407 U.S. 514, 519 (1972)). "[D]elay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pre-trial detention, and prolong the period during which defendants released on bail may commit other crimes." *Id.* Accordingly, we interpret the collateral order doctrine with the "utmost strictness" in criminal cases. *California v. Mesa,* 813 F.2d 960, 962 (9th Cir. 1987) (citing *Flanagan,* 465 U.S. at 265).

A major characteristic of an appealable claim under the collateral order doctrine is that "unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all." *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985) (quoting *Stack v. Boyle,* 342 U.S. 1, 12 (1952)). Were this a civil case, we would have interlocutory jurisdiction over a court's pretrial denial of a qualified immunity claim. *See id.; Cunningham v. City of Wenatchee,* 345 F.3d 802, 808-09 (9th Cir. 2003). This is true, in part, because an official's qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously

permitted to go to trial." *Mitchell,* 472 U.S. at 526 (emphasis in original).

Lewis argues that the fair warning requirement similarly shields him from criminal prosecution, rather than merely providing a defense to conviction. In doing so, Lewis points to the Supreme Court's statement that fair warning and qualified immunity serve similar objectives: "to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier,* 520 U.S. 259, 270-71 (1997). Lewis, however, reads *Lanier* too broadly.

While noting the two doctrines' similar purpose, the Court in *Lanier* did not hold that the fair warning requirement insulates a criminal defendant from standing trial, as qualified immunity does for a civil defendant. Rather, the Court held that qualified immunity provides officials "the same protection from civil *liability* that individuals have traditionally possessed in the face of vague criminal statutes."[2] *Id.* at 270-71 (emphasis added). Without express authority, we will not expand the scope of

[2] *Lanier* involved a defendant, state judge David Lanier, who was convicted under 18 U.S.C. § 242 for criminally violating the constitutional rights of five women by sexually assaulting them while he was in state office. The Supreme Court overturned the Sixth Circuit's conclusion that criminal liability could be imposed under § 242 only if the Supreme Court had previously identified the constitutional right at issue in a case with fundamentally similar facts. *Lanier,* 520 U.S. at 263. In reversing, the Supreme Court held that due process under § 242 does not demand more than the "clearly established" law requires for a public officer to be held civilly liable for a constitutional violation under § 1983 or *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388 (1971). *Lanier,* 520 U.S. at 270.

immunity to criminal *prosecution*, "regardless of whether in some circumstance [that immunity] may provide a bar to conviction." *Pace*, 201 F.3d at 1119-20. Lewis cites no case, nor can we find any, that has extended fair warning to include a protection from standing trial.[3]

Not only do we lack authority to expand the fair warning requirement's scope, the rules of criminal procedure give us good reason not to do so. A district court can only grant a dismissal in the criminal context if the issue is "'entirely segregable' from the evidence to be presented at trial." *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (citations omitted). Otherwise, "the motion falls within the province of the ultimate finder of fact and must be deferred [to the jury]." *Id.*

Here, Lewis's fair warning claim involves questions inextricably intertwined with the question of his alleged guilt. The government accuses Lewis of willfully depriving Long of his Eighth Amendment right against cruel and unusual punishment. Specifically, the government charged Lewis, in part, with violating 18 U.S.C. § 242. That code section makes it a criminal act to act "(1) 'willfully' and (2) under color of [state] law (3) to deprive a person of rights protected by the Constitution or laws of the United

[3] Notably, qualified immunity and fair warning derive from two entirely separate sources. The fair warning requirement, which springs from the Due Process Clause, protects a defendant from criminal liability. *See Harriss*, 347 U.S. at 617. Qualified immunity, on the other hand, is a common-law "*immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, which public officials typically invoke as a defense to 42 U.S.C. § 1983 claims. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 554 (1967) (applying qualified immunity to a police officer after noting that Congress never meant to abolish common-law immunities).

States." *Lanier,* 520 U.S. at 264 (citing *Screws v. United States,* 325 U.S. 91 (1945)). Lewis counters that § 242 failed to provide fair warning that his actions violated Long's Eighth Amendment rights. Lewis bases this defense on the same evidence that the Government will introduce at trial to support the underlying charge. Consequently, Lewis's defense is not "entirely segregable" from the evidence the Government will present at trial.

We recognize that, in certain situations, courts may dispose of factual questions underlying immunity defenses before subjecting the defendant to a criminal trial. For instance, courts may decide the facts supporting a double jeopardy claim or the scope of an immunity agreement before allowing the jury to deliberate on guilt. *See, e.g., United States v. Anderson,* 79 F.3d 1522, 1525-31 (9th Cir. 1996) (reviewing a district court's denial of a pre-trial motion for a *Kastigar*[4] hearing); *United States v. Mendoza,* 78 F.3d 460, 464-65 (9th Cir. 1996) (reviewing whether the government breached an immunity agreement); *United States v. Gutierrez-Zamarano,* 23 F.3d 235, 237 (9th Cir. 1994) (reviewing a defendant's double jeopardy claim). None of these claims, however, dealt with the underlying merits. Here, Lewis's claim goes directly to the underlying merits; the evidence he seeks to introduce regarding his fair warning defense goes to the heart of his criminal liability.

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[4] *Kastigar v. United States,* 406 U.S. 441, 460-62 (1972) (holding that a defendant "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all evidence it proposes to use was derived from legitimate, independent sources").

The fair warning doctrine may ultimately protect Lewis from criminal liability. That, however, is an issue we can review after judgment, if necessary. We therefore dismiss the interlocutory appeal of Lewis's fair warning claim.

B. Lewis's Double Jeopardy Claim

Lewis contends that the prosecution's alleged *Brady* violations at his initial trial implicate the Double Jeopardy Clause. Specifically, Lewis claims that during the original trial the prosecution withheld certain exculpatory statements by Long and a fellow prison guard. He alleges that the Government committed these violations to avoid acquittal.

Courts typically review *Brady* violations post-trial. *See United States v. Smith*, 282 F.3d 758, 770 (9th Cir. 2002). Lewis seeks to get around this bar and justify interlocutory review by creatively arguing that the Government's alleged *Brady* violations constitute a double jeopardy bar. A district court's pre-trial order rejecting a claim of double jeopardy constitutes a "final decision" and thus satisfies the collateral order doctrine. *Abney v. United States*, 431 U.S. 651, 662 (1977). Nevertheless, any double jeopardy claim must be "colorable" for this court to possess jurisdiction. *See Richardson v. United States*, 468 U.S. 317, 322 (1984); *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002). Lewis's claim is colorable only because it raises two issues of first impression in this circuit: (1) whether a defendant can invoke the Double Jeopardy Clause due to a prosecutor's alleged *Brady* violation and (2) whether the Double Jeopardy Clause applies to a situation where the defendant overturns a conviction on

appeal. *See Price,* 314 F.3d at 420. We therefore review *de novo* the district court's denial of Lewis's double jeopardy claim. *See id.*

We have never addressed whether a defendant can invoke the Double Jeopardy Clause due to a prosecutor's alleged *Brady* violation. Other circuits, however, have explicitly held that defendants may not invoke the Double Jeopardy Clause in such circumstances. We agree with the conclusions of those circuits.

As the Third Circuit noted, *Brady* serves the limited purpose of ensuring a defendant's due process right to a fair trial. *United States v. Coleman,* 862 F.2d 455, 458 (3d Cir. 1988). The Tenth Circuit has similarly stated that "the most an invocation of *Brady* could accomplish would be the ordering of a new trial in which the withheld information is fully disclosed." *United States v. Davis,* 578 F.2d 277, 280 (10th Cir. 1978). Here, Lewis already has the very remedy that *Brady* prescribes, a second trial. *See id.* Any evidence that the prosecution allegedly withheld is now known and available for trial.

Barring a retrial for the prosecution's alleged intentional *Brady* violations would be an unnecessary expansion of the Double Jeopardy Clause. Courts have authority to police a prosecutor's ethical misconduct. *See United States v. McClintock,* 748 F.2d 1278, 1285-86 (9th Cir. 1984). They can dismiss actions where government attorneys have "willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice."[5] *United States v. Nat'l Med. Enters., Inc.,*

[5] To justify dismissing an action for prosecutorial misconduct, "the government's conduct must have caused substantial prejudice to the

(Continued on following page)

792 F.2d 906, 912 (9th Cir. 1986). Thus, courts can remedy intentional misconduct without expanding the scope of *Brady*.

The record here does not suggest prosecutorial misconduct, and Lewis does not merit relief on these grounds. As the district court noted, Long's testimony about the alleged weapon was "all over the board." Long consistently testified before trial that no such weapon existed. Only after trial did Long testify about a possible weapon. Long's testimony regarding the prosecutor's instructions was similarly inconsistent. While he blamed the prosecutor for dissuading him from mentioning the razor blade earlier, Long also stated that no agent or prosecutor ever told him to lie. Concerning the other correctional officer's testimony, the Government had fully disclosed her name and position to the defense before trial. The guard did not witness the fight or shooting.

We note an additional problem for Lewis's double jeopardy claim. Double jeopardy ordinarily does not apply if a defendant obtains a mistrial. Courts presume that the defendant, in seeking a mistrial, gives up his or her right to a verdict by that jury. *See United States v. Tateo,* 377 U.S. 463, 467 (1964). A narrow exception to this "motion for mistrial" rule exists where the government engages in prosecutorial misconduct "intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy,* 456 U.S. 667, 679 (1982). This exception prevents prosecutors from sinking a case they knew was doomed to end in an

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defendant and been flagrant in its disregard for the limits of appropriate professional conduct." *United States v. Lopez,* 4 F.3d 1455, 1464 (9th Cir. 1993).

acquittal in the hope of having better luck before a second jury.

Here, Lewis does not allege that the prosecution provoked him into moving for a mistrial. The case, in fact, went to the jury; Lewis did not learn of the alleged misconduct until after he overturned his conviction on appeal. We have not directly addressed whether the Double Jeopardy Clause applies in such a case.

Other circuits, however, have declined to broaden the scope of the Double Jeopardy Clause in this fashion. The Tenth Circuit, for instance, noted that "without the declaration of a mistrial, [defendants are] not deprived of their 'valued right' to have their case submitted to the first jury." *United States v. McAleer,* 138 F.3d 852, 856 (10th Cir. 1998). Furthermore, prosecutors engage in covert misconduct "to win at trial – not to force a second go-around in a complicated, expensive, lengthy and resource-depleting trial." *United States v. Doyle,* 121 F.3d 1078, 1087 (7th Cir. 1997); *see also Jacob v. Clarke,* 52 F.3d 178, 181 (8th Cir.); *United States v. Zuno-Arce,* 25 F. Supp. 2d 1087, 1114-15 (C.D. Cal. 1998) (concluding that "setting aside the jury verdict" is not the functional equivalent of a motion for mistrial under *Kennedy*).

We are aware that the Second Circuit has surmised, in dicta, that the Supreme Court "might think" that the Double Jeopardy Clause protects a defendant from retrial in instances other than after successful motions for mistrial.[6] *See United States v. Wallach,* 979 F.2d 912, 916 (2d

[6] After speculating that prosecutorial misconduct designed to avoid acquittal might justify such an expansion, the court concluded that the case then before it did not involve the type of deliberate misconduct

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Cir. 1992). The Second Circuit warned, however, that any such expansion of *Kennedy* would have to be narrow, as prosecutors design every action to prejudice the defendant. *Id.* Any such expansion, the court theorized, would be appropriate "only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Id.*

Several subsequent cases have referenced the reasoning in *Wallach*. None, however, concluded that the relevant prosecutorial misconduct was sufficiently egregious to bar a retrial. *See, e.g., United States v. Gary,* 74 F.3d 304, 315 (1st Cir. 1996) (holding that no deliberate prosecutorial misconduct existed after the first trial ended in a hung jury); *United States v. Pavloyianis,* 996 F.2d 1467, 1473-75 (2d Cir. 1993) (concluding that no prosecutorial misconduct existed to warrant an expansion of *Kennedy* as suggested in *Wallach*). The California Supreme Court adopted the reasoning in *Wallach* but, in doing so, explicitly noted that "we need not, and do not, determine whether *Wallach* . . . articulates a proper test – under either the federal or state constitutional double jeopardy clauses – for misconduct that results in *reversal on appeal.*" *People v. Batts,* 30 Cal. 4th 660, 694 (2003) (emphasis in original). Similarly, Lewis makes no showing that the prosecutors deliberately engaged in misconduct in order to secure a second trial. Thus, even if Lewis were

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that might invoke a double jeopardy bar to retrial. *Wallach,* 979 F.2d at 917. Specifically, the court concluded that there was no evidence that the prosecution anticipated an acquittal or that the prosecutors purposely elicited untruthful testimony about the defendant. *Id.*

able to raise a double jeopardy claim, the alleged prosecutorial misconduct here is not sufficient to bar a retrial.

Lewis has received one of the remedies that *Brady* envisions, a new trial. The prosecution's alleged *Brady* violations in this case simply do not implicate the Double Jeopardy Clause or otherwise bar his retrial. The district court thus did not err in rejecting Lewis's double jeopardy claim.

CONCLUSION

We DISMISS Lewis's fair warning claim for lack of jurisdiction. Although we have jurisdiction over his double jeopardy claim because it raises a colorable claim, the substance of that double jeopardy claim lacks merit. We therefore AFFIRM the district court's denial of Lewis's motion to dismiss with respect to the double jeopardy claim.

DISMISSED, in part, and **AFFIRMED**, in part.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MAXINE M. CHESNEY, JUDGE

UNITED STATES OF AMERICA, PLAINTIFF, VS. DAVID GENE LEWIS, DEFENDANT.	NO. CR 99-186 MMC

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, MARCH 19, 2003

* * *

[15] THE COURT: ALL RIGHT. THANK YOU. NOW, AGAIN NOW, I'LL DEEM THIS PARTICULAR MOTION SUBMITTED, BUT THE COURT'S RATIONALE IS AS FOLLOWS: THAT NONE OF THE CASES THAT HAVE BEEN PROVIDED BY DEFENDANT'S COUNSEL FOR PRETRIAL REVIEW OF THE IMMUNITY ISSUE ARISE IN THE CRIMINAL CONTEXT. THEY ARE ALL CIVIL CASES.

THE COURT IS WELL-AWARE THAT THE TWO ISSUES, BOTH THE ISSUE OF LIABILITY AND THE ISSUE OF IMMUNITY, DO NOT MERGE. AND THAT THE COURT HAS AN OBLIGATION TO ADDRESS THE IMMUNITY ISSUE AT THE EARLIEST POSSIBLE OPPORTUNITY.

THIS MAY BE, FRANKLY, AFTER THE GOVERNMENT PUTS IN ITS CASE-IN-CHIEF.

SO WHAT WE HAVE HERE IS WE HAVE A DISTINCTION BOTH AS TO THE PROCEDURE AND ALSO THE ACTUAL EVIDENCE THAT WOULD BE BEFORE A COURT IN A CIVIL CASE. IT'S NOT BEFORE THE COURT IN THIS MATTER. AND MOST PARTICULARLY, WHAT THE DEFENDANT WAS THINKING WHEN HE SHOT HIM, THE VICTIM ALLEGED.

AS I SAY, I DON'T WANT TO GO THROUGH AN UNNECESSARY TRIAL. ANY RETRIAL IS BASICALLY LIKE EATING LEFTOVERS. YOU JUST AS SOON NOT DO IT IF YOU DON'T HAVE TO.

[16] BUT IF WE HAVE TO HAVE A RETRIAL, WE'RE GOING TO HAVE A RETRIAL.

NOW, ON THIS NEXT POINT, WHICH IS THE MISCONDUCT QUESTION, WHAT I UNDERSTAND IS WE HAVE – I FORGET WHAT EVIDENCE, FRANKLY, I HAVE.

NOW, DO I HAVE A DECLARATION OF ANY SORT?

MS. KANE: NO, YOU DON'T, YOUR HONOR. AND IF WE COULD, BEFORE WE MOVE ON TO THE NEXT MOTION BECAUSE THERE'S SOMETHING THAT THE GOVERNMENT WANTS TO LET THE COURT KNOW ABOUT THAT NEXT MOTION.

I THINK WE JUST WANTED TO CLARIFY WITH RESPECT TO THE PREVIOUS MOTION ONE THING.

THE COURT: OKAY.

MR. RAMSEY: WE JUST WANTED TO CLARIFY EXACTLY WHAT ASPECT OF THE RECORD YOU WERE RELYING ON TO MAKE YOUR DECISION, THE FACTUAL RECORD, WHETHER IT WAS THE ALLEGATIONS SET FORTH IN THE INDICTMENT.

THE COURT: WELL, THE ALLEGATIONS ARE THAT THE DEFENDANT MALICIOUSLY AND WITHOUT JUSTIFICATION SHOT SOMEBODY WHO WAS IN HIS CHARGE.

I THINK ANYONE WHO READS THE STATUTE WOULD UNDERSTAND FROM CASE LAW THAT IF THAT'S TRUE, THAT BEHAVIOR IS COVERED.

NOW, THIS IS NOT ABERRANT BEHAVIOR. IT'S NOT A NEW CONCEPT. WHAT THE DEFENDANT IS ARGUING IS THAT THEY DIDN'T DO [17] THAT, BASICALLY.

MR. RAMSEY: THANK YOU.

THE COURT: SO ALL RIGHT.

MR. RIORDAN: YOUR HONOR, ON THIS MOTION WE'RE NOT ARGUING THE DEFENDANT DID THIS.

THE COURT: WELL, THEN, FOR SURE HE'S NOT GOING TO WIN.

MR. RIORDAN: THAT'S NOT TRUE. I MEAN, IN THE *MARQUEZ* CASE, THEY SAID –

THE COURT: OKAY. I'VE ALREADY TAKEN IT UNDER SUBMISSION.

MR. RIORDAN: OKAY.

THE COURT: I READ THE *MARQUEZ* CASE. I'M NOT EXACTLY SURE HOW THE COURT PROCEEDED, BUT FROM WHAT I READ THEY HAD A LOT OF EVIDENCE BEFORE THEM IN A CIVIL CASE. AND THEY SAID, IN EFFECT.

> "THERE'S NOTHING TO CONTRADICT THE OFFICER WHO SAID THAT HE COULDN'T TELL WHO HE WAS SHOOTING, AND HE SHOT SOMEONE WHO HE THOUGHT WAS A KICKER. AND A REASONABLE PERSON UNDER THE CIRCUMSTANCES COULD HAVE BEEN MISTAKEN."

THAT'S WHAT I UNDERSTAND IS BEING SAID THERE. THERE WASN'T ANY OTHER EVIDENCE.

I'M NOT SURE THERE'S A LIABILITY ISSUE THERE WHEN YOU HAVE SOMEONE WHO REASONABLY, REASONABLY THINKS THEY ARE [18] PROHIBITING OR – YES. YES, PROHIBITING DEADLY CONDUCT. OKAY.

* * *

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, APRIL 9, 2003

* * *

[24] THE COURT: ALL RIGHT. FIRST OF ALL, I DON'T BELIEVE THAT WE NEED AN EVIDENTIARY HEARING IN THIS MATTER. ALTHOUGH THE COURT IS NOT IN A POSITION TO MAKE AN ULTIMATE FINDING OF CREDIBILITY, TO THE EXTENT THAT THE CREDIBILITY OF MR. LONG IS REASONABLY SUBJECT TO QUESTION AND WAS AT THE TIME OF

THE EVENTS IN QUESTION, I THINK THAT HAS SOME BEARING ON THE ISSUE PRESENTED, WHICH IS WAS THERE A CONSCIOUS INTENT AND EFFORT TO EITHER ELICIT PERJURED TESTIMONY OR TESTIMONY CONTRARY TO WHAT THE GOVERNMENT KNEW TO BE THE ACTUAL FACT.

HERE WE HAVE SOMEONE, WHO BEFORE THE INSTRUCTIONS, IF YOU WILL, WERE PROVIDED TO THE WITNESS, WAS GIVEN AMPLE OPPORTUNITY TO DESCRIBE THE ASSAULT ON HIMSELF AT – IN DETAIL, [25] AND HE GAVE A LENGTHY ANSWER AT THE GRAND JURY AND NEVER MENTIONED THE WEAPON OR ANY WEAPON IN ANY WAY.

HE MAY WELL HAVE, IN LIGHT OF AGENT WALKER'S RECOLLECTION, MENTIONED IN THE COURSE OF A LATER INTERVIEW THAT HE HAD SOME TYPE OF IMPRESSION OR IDEA THAT THERE MIGHT BE A GUN. I'M SORRY, A WEAPON.

IN HIS TRIAL TESTIMONY HE SAYS THAT HE TOLD MR. AUSTIN THAT – HE DIDN'T TELL MR. AUSTIN THERE WERE ANY WEAPONS, AND THAT HE WASN'T SURE WHETHER THERE WERE OR NOT. AT ONE POINT HE KIND OF SPECULATES: I DIDN'T SEE ANY, BUT THERE MIGHT HAVE BEEN ONE.

HE GOES INTO GREAT DETAIL ABOUT THE GRAVEL AND WHAT HAPPENED TO IT, WHEN HE WAS HIT WITH THIS SACK OF GRAVEL THAT HE HAS DESCRIBED AND HE NEVER MENTIONS ANY KIND OF WEAPON. HE IS ALL OVER THE BOARD AS HE STARTS TO DESCRIBE THIS WEAPON AT HIS DEPOSITION. AT ONE POINT IT'S IN THE RIGHT HAND. AT ONE POINT IT'S IN THE LEFT HAND. HE

SAYS HE GRABBED THAT HAND. WE KNOW HE DID NOT HAVE ANY DEFENSIVE INJURIES FROM A SLASHING OR STABBING INSTRUMENT. THE ONLY INJURY HE SUSTAINED WAS THE INJURY FROM THE GUN SHOT. AND PERHAPS – I'M NOT SURE IF HE HAD SOME HEAD TRAUMA FROM THE ORIGINAL ATTACK ON HIM OR NOT. I CAN'T REMEMBER NOW. BUT NOTHING THAT WAS CONSISTENT WITH A SLASHING OR STABBING WEAPON.

I AGREE WITH MISS KANE THAT IT WAS PROBABLY – IT WAS NOT THE COURSE TO TAKE IF HE DID TELL A WITNESS TO SAY YOU [26] DON'T KNOW. IN OTHER WORDS, YOU SHOULDN'T PUT WORDS IN A WITNESS' MOUTH. HE MAY WELL HAVE TOLD MR. LONG, DON'T BRING IT UP YOURSELF. DON'T VOLUNTEER INFORMATION. IF SOMEBODY ASKS YOU ABOUT IT, THEN YOU HAVE TO ANSWER WITH WHATEVER YOU RECALL.

HE SHOULD, HOWEVER, IN ALL LIKELIHOOD, HAVE TURNED THIS OVER AS BRADY MATERIAL BECAUSE HE SHOULDN'T BE THE ULTIMATE DETERMINER OF THE CREDIBILITY, THAT IF THE WITNESS SAID ANYTHING ABOUT THERE BEING A WEAPON GIVEN THAT IT WAS RELEVANT. IT SHOULD HAVE BEEN TURNED OVER.

I DON'T FIND IN THIS CASE, THAT IF ONE CAN DISMISS FOR GROSS MISCONDUCT, THAT THIS MISCONDUCT, IF IT WERE SUCH, TAKING EVERYTHING IN FAVOR OF THE DEFENDANT IN THIS MATTER, UNDISPUTED FACTS, WAS SUCH THAT IT WOULD RISE TO THAT LEVEL. THERE HAS BEEN A NEW TRIAL GRANTED WITHOUT NEED TO DO SO

BASED ON THIS PARTICULAR EVENT WHICH MAY OR MAY NOT HAVE GIVEN RISE TO THE REENTRY OF A NEW TRIAL.

WHETHER IT WAS PREJUDICIAL OR NOT IS NOT TOTALLY CLEAR, BUT I'M NOT PREPARED TO DISMISS THE CASE AND I DON'T FIND THAT THERE IS A WILLFUL SUPRESSION OUT OF THE EVIDENCE CONCERNING THE WITNESS IN THE GUARD TOWER. EVEN IF AN INFERENCE OR PRESUMPTION IS RAISED, AND I DON'T KNOW THAT IT IS, THAT A FAILURE TO DISCLOSE IS A WILLFUL FAILURE. I THINK IT'S BEEN REBUTTED BY THE MANNER OF KEEPING THE RECORDS AS DESCRIBED BY MISS KANE AND THE FACT THAT THE WITNESS WAS FULLY DISCLOSED AND THE FACT THAT THIS WAS A WITNESS AT THE TIME OF [27] THE EVENT AND ON THE DAY OF THE SHOOTING.

SO ALL THOSE WOULD CUT AGAINST IT BEING A WILLFUL FAILURE TO DISCLOSE SHOULD THAT BE SIGNIFICANT HERE.

HAVING SAID ALL THAT THEN, YOU KNOW WHAT MY RULING IS. MY RULING IS TO DENY THE MOTION, AND THEN WHERE ARE WE?

MS. KANE: WE WOULD ASK THE COURT TO HOLD ITS FINAL RULING ON PART ONE OF THE MOTION THAT WE HEARD SEVERAL WEEKS BACK, SORT OF IN ABEYANCE TO TODAY'S DATE SO THAT IT WOULDN'T TRIGGER ANY APPELLATE PROCESS, ALTHOUGH THE COURT DID INDICATE THAT THE MOTION TO DISMISS BASED ON THE QUALIFIED IMMUNITY ARGUMENT WAS ALSO LIKE TO BE DENIED.

THE COURT: AT THIS POINT, IS THERE ANY REASON NOT TO ACTUALLY ENTER AN ORDER AS OPPOSED DO ISSUING A TENTATIVE DECISION.

MS. KANE: I'M NOT AWARE OF ANY, NO.

MR. RIORDAN: NO, YOUR HONOR.

THE COURT: THEN THE MOTION FOR THE REASONS STATED AT THE LAST CALLING AND FOR THE REASONS STATED AT THE INSTANT CALLING IS HEREBY DENIED.

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, v. DAVID GENE LEWIS, Defendant-Appellant.	No. 03-10181 D.C. No. CR-99-00186-1-MMC Northern District of California, San Francisco ORDER (Filed Aug. 04, 2004)

Before: WALLACE, McKEOWN, and CALLAHAN, Circuit Judges.

Judges McKeown and Callahan have voted to deny the petition for rehearing en banc and Judge Wallace so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.